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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARLINGTON COUNTY

and

MICHAEL KYLE,

Petitioners,

v.

ALVIN B. BISCOE, JR.

and

ELEANOR L. BISCOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit erroneously decided the question that this Court reserved in *Nevada v. Hall*—namely, whether a forum state is constitutionally free to apply the forum's law and ignore important sister state law enforcement policies, when the forum state's action will interfere with the sister state's "capacity to fulfill its own sovereign responsibilities"?

2. Whether the D.C. Circuit misapplied this Court's decision in *Nevada v. Hall* (a) by imposing liability for law enforcement activities committed within the sister state's borders, (b) by unconstitutionally imposing more stringent liability rules on out-of-state police than those applicable to D.C.'s own police officers, (c) by ignoring the very strong interest of Virginia in enforcing its laws through fresh pursuit of individuals who have committed crimes within that State and then fled to D.C., (d) by failing to acknowledge that D.C.'s policies do in fact support recognition of Virginia's rules on immunity, and (e) by ignoring Congressional intent in enacting the D.C. Fresh Pursuit Act?

3. Whether the application of a higher standard of liability to a foreign police officer performing his duties within the forum state (at the invitation of the forum state) than the standard which would be applied to a forum state's officer is violative of the Privileges and Immunities Clause (Article IV, § 2) and the Equal Protection Clause (Amendment XIV) of the Constitution?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Arlington County prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 738 F.2d 1352 (D.C. Cir. 1984) and is included in the Appendix to this petition at A-1. The order of the Court of Appeals denying rehearing sought by Petitioners, and the judgment of the Court of Appeals was entered on August 17, 1984.

GROUNDS OF JURISDICTION

The original judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered on July 6, 1984. Petitioners' timely petition for rehearing was denied on August 17, 1984, and this petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1982).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an Act of Congress, the D.C. Fresh Pursuit Act, which was enacted as part of the D.C. Court Reform and Criminal Procedure Act of 1970. Pub. L. No. 91-358, 84 Stat. 634 (1970):

> *Arrests in the District of Columbia by officers of other States.*
>
> Any member of a duly organized peace unit of any State (or county or municipality thereof) of the United States who enters the District of Columbia in fresh pursuit and continues within the District of Columbia in fresh pursuit of a person in order to arrest him on the ground that he is believed to have committed a felony in such State shall have the same authority to arrest and hold that person in custody as has any member of any duly organized peace unit of the District of Columbia to arrest and hold in custody a person on the ground that he is believed to have committed a felony in the District of Columbia. This section shall not be construed so as to make unlawful any arrest in the District of Columbia which would otherwise be lawful.

D.C. Code Ann. § 23-901 (1981 ed.). This case also involves the Full Faith and Credit and the Privileges and Immunities Clauses of Article IV of the Constitution and the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The relevant portions of these

constitutional provisions are found at p. 39a of the Appendix.

STATEMENT OF THE CASE

This case involves the efforts of an Arlington County, Virginia police officer to apprehend professional bank robbers who had come from D.C. and robbed a savings and loan in Arlington. The Arlington County officer, Michael Kyle, stopped the robbers' car on the E Street ramp off the Theodore Roosevelt Bridge as the robbers fled back to the District. The robbers then escaped from the officer and fired shots at the officer as they resumed their flight at high speed through the E Street Expressway exit off the Roosevelt Bridge. The robbers' car collided with another car within one and a half blocks of emerging from the E Street tunnel and injured a pedestrian. The Arlington County police car was well behind the robbers' car at the time of the accident and was not involved in the collision. The entire series of events from the stop on the bridge through the collision took less than a minute.

The pedestrian and his wife sued the police officer and Arlington County, alleging, *inter alia*, that Arlington County negligently trained and supervised police officer Kyle, that the police procedures utilized in the stop on the bridge negligently allowed the robbers to escape and that the pursuit of the robbers by officer Kyle for a few hundred yards on the E Street Expressway was negligent.

The jury found that Arlington County was negligent in its training and supervision of officer Kyle and that officer Kyle was negligent in his conduct of the felony stop and in his pursuit of the robbers' vehicle. The jury returned a verdict of $4 million for the plaintiff and $1 million for plaintiff's wife. (The verdict in favor of the wife was reduced to $350,000 on remittitur.)

REASONS FOR GRANTING THE WRIT

1. The D.C. Circuit in this case has allowed a forum state to interfere with a sister state's sovereign law enforcement responsibilities.

This case involves one of the most important (if not *the* most important) function of a sovereign state—the enforcement of the state's criminal laws. This Court has specifically recognized that law enforcement is "one of the basic functions of government, especially in a complex modern society where police presence is pervasive. The police function fulfills a most fundamental obligation of government to its constituency." *Foley v. Connelie*, 435 U.S. 291, 297 (1978).

As the Court of Appeals itself recognized, a state's immunity policy in the area of law enforcement "no doubt . . . reflects the state's concern that the prospect of liability will deter police officers from proper performance of their duties." 738 F.2d at 1360. Thus Virginia's rule of law that counties are absolutely immune from suit with respect to acts of county police officers[1] reflects, in the area of criminal law, a strong state policy to avoid deterring vigorous law enforcement.

As the Virginia Supreme Court has recently stated:

> . . . the doctrine of sovereign immunity is 'alive and well' in Virginia. Though this Court has, over the

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[1] Virginia has made it clear that the individual employee, of an immune local government, must share in that immunity:

> . . . in order to fulfill those purposes [of sovereign immunity] the protection afforded by the doctrine cannot be limited solely to the sovereign . . . . limiting protection to the [county] itself does nothing to insure that officials will act without fear.

Messina v. Burden, No. 81-1485, slip op. at —— (Va. Oct. 12, 1984). In *Messina*, the Virginia Supreme Court held that County employees must be afforded immunity when their activities involve "judgment and discretion," the County exercises administrative control over them and has a clear interest in the work performed by them.

> years, discussed the doctrine in a variety of contexts . . . , we have never seen fit to abolish it. Nor does the General Assembly want it abolished. . . .
>
> . . . without the doctrine there would exist inconvenience and danger to the public in the form of public officials being fearful and unwilling to carry out their public duties.

Messina v. Burden, No. 81-1485, slip op. at —— (Va. Oct. 12, 1984).

Yet the decision of the D.C. Circuit in this case would allow a lay jury in the forum state to second guess professional police decisions made by the police of a neighboring state such as:

- the way the police officer positioned his police car when he stopped the suspects' vehicle;
- the steps the officer took—or failed to take—to secure the suspects following the stop;
- the actions of the dispatcher in allowing the stop to proceed without waiting for back-up units;
- the training and supervision of the officer with respect to these matters.

It is particularly noteworthy that the forum state jury was allowed to review—and judge—the quality and adequacy of the training and supervision provided *by* another state *in* that state *to* that state's own police officers.

It is frankly difficult to imagine an example of more direct interference in sovereign law enforcement policies of one sovereign state by the courts of another. From the point of view of this Court, the question is not whether such interference through the imposition of civil negligence liability is good policy or bad policy. The issue for this Court is the clash of interests between two sovereign states. In the present case, the D.C. Circuit takes the position (1) that the District of Columbia permits lay juries to impose liability based on review of these types

of police decisions made by D.C. police officers;[2] (2) that Virginia does not permit lay juries to impose liability based on this type of review; but (3) that the forum state —in this case, the District of Columbia—may impose the views of its lay juries on the law enforcement authorities of Virginia. The authority cited for this proposition is this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979).

The ironic result of the D.C. Circuit's reasoning will be that Maryland and the District of Columbia will set the standards for the training and supervision of Virginia state and county policemen while Virginia courts are foreclosed from such standard setting. Such a result with respect to the sovereign exercise of law enforcement powers is simply not consistent with the cooperative federalism established by the Constitution.

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[2] It is worth noting for the record that the D.C. Circuit's interpretation of D.C. law in fact dramatically expands the exposure of the District to negligence lawsuits. The law in the District of Columbia has always distinguished between "discretionary" activities immune from suit and "ministerial" activities that are subject to suit. The D.C. Circuit's opinion distorts this ministerial/discretionary dichotomy essentially beyond recognition to achieve an extraordinary expansion of the types of actions of D.C. police officers that would be subject to suit. The D.C. Circuit does so by utilizing selective quotations from the language of various opinions to emphasize a distinction—created entirely by the D.C. Circuit's opinion—between "day-to-day operational matters" and "planning and policy." It is precisely by abandoning the established test for distinguishing "discretionary" from "ministerial" actions—and moving to an exclusive emphasis on "operational" decisions contrasted with "policy" decisions—that the D.C. Circuit has so radically extended the liability to which police officers and their employers are and will be subject. Even aside from the fact that the D.C. Circuit has no authority to revise the substantive tort law of the District of Columbia and has usurped the authority of the D.C. Court of Appeals, see *Erie v. Tompkins*, 304 U.S. 64 (1938), the D.C. Circuit's new formulation plainly subjects—for the first time ever—every "operational" police decision made on the streets to negligence lawsuits.

The very fact that such interference in the internal law enforcement activities of another state has been approved—for the first time in any case petitioners can find —is reason enough for review by this Court.

2. This case squarely raises the issue on which this Court reserved decision in *Nevada v. Hall*—which this Court should now decide.

Section 1 of Article IV of the United States Constitution provides, in pertinent part, that: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." In *Nevada v. Hall, supra*, a California resident had been injured in a traffic accident in California through the negligence of an employee of the University of Nevada driving a vehicle owned by the state of Nevada. This Court held there was no constitutional impediment to a California court permitting suit to be brought against Nevada in California and refusing to apply Nevada's law relating to governmental immunity:

> the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.

440 U.S. at 422.

But the majority opinion explicitly made clear that the statement quoted above applied only to factual circumstances similar to those in that case. In response to dissents by Justice Blackmun and Justice Rehnquist that asserted the majority in *Nevada v. Hall* was undermining our federal system, Justice Stevens wrote a critically important footnote to his majority opinion:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this

> case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

440 U.S. at 424 n.24.

Nor can there be any doubt that this footnote was important to the majority opinion in *Nevada v. Hall*. For in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1980), Justice Stevens—the author of *Nevada v. Hall*—specifically emphasized that the Full Faith and Credit Clause should invalidate a state court's choice of forum law if "that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State." 449 U.S. at 323 (concurring opinion). In making this statement, Justice Stevens specifically quoted footnote 24 from *Nevada v. Hall* and noted that *Nevada v. Hall* " 'pose[d] no substantial threat to our constitutional system of cooperative federalism.' " *Id.*

The present case plainly is a case in which the D.C. Circuit has allowed the forum state's choice of law decision to "interfere with [Virginia's] capacity to fulfill its own sovereign responsibilities" to enforce its own criminal laws and those of the United States. Petitioners submit that the Full Faith and Credit Clause prohibits this result. This Court specifically reserved decision in *Nevada v. Hall* on the question whether the Full Faith and Credit Clause required a Forum State to apply a sister state's law when that law did not frustrate the public policy at the Forum State. This Court should now resolve this issue.

3. The D.C. Circuit's opinion misreads and misapplies *Nevada v. Hall* to such an extent that it will foster serious clashes between sister states if this Court does not correct the erroneous interpretation.

The D.C. Circuit accurately set out petitioners' strongly stated position that "the District's failure to apply Virginia's immunity rules in this case undermines the Coun-

ty's capacity to fulfill its law enforcement responsibilities." 738 F.2d at 1358.

The Court of Appeals rejected this argument by turning this Court's opinion in *Nevada v. Hall* into a virtually unlimited license for a forum state to apply its law without regard to its impact on the sovereign policies of its sister state. In effect, the D.C. Circuit simply announces that footnote 24 to *Nevada v. Hall* has no force or effect. The D.C. Circuit set out two grounds for its view that footnote 24 was simply surplusage.

First, the Court of Appeals explicitly acknowledged that this Court's opinion in *Nevada v. Hall* stated that "the facts of *Nevada v. Hall* did not threaten Nevada's sovereign responsibilities." 738 F.2d at 1358, quoting 440 U.S. at 424 n.24. But the Court of Appeals—in an extraordinary example of judicial legerdemain—blythly asserts that the *Nevada v. Hall* Court's emphasis of that point "does not in any respect limit the holding to the facts of that case. Nor does the footnote suggest an exception must ever be made to the principles articulated in the opinion." *Id.* In other words, the D.C. Circuit's first preference is simply to ignore this Court's explicit limitation of what was decided in *Nevada v. Hall.*

Second, the D.C. Circuit takes an alternative position. Even if this Court meant to suggest "an exception to the broad principle that the opinion [in *Nevada v. Hall*] establishes—to wit, that the constitution does not mandate interstate comity", the D.C. Circuit concludes that such an exception was limited to "exceptional" cases. *Id.*

Petitioners submit that the D.C. Circuit is simply refusing to admit what this Court said in *Nevada v. Hall* and has fundamentally misstated the question that this Court reserved in footnote 24 of its opinion in *Nevada v. Hall.* The simple fact is that *both* Virginia and D.C. as well as the federal government have an interest in seeing that law breakers do not evade capture by fleeing

across borders. To that end, the Congress has enacted the D.C. Fresh Pursuit Act, D.C. Code Ann. § 23-901, and Virginia has enacted its own fresh pursuit statute. Va. Code Ann. § 19.2-79. The D.C. Circuit denigrates the importance of these law enforcement activities (without ever mentioning either of the two statutes cited above) by claiming the only issue is whether "application of Virginia's policy of immunity would . . . frustrate District policies in favor of deterrence and compensation." 738 F.2d at 1358. (As discussed below, D.C.'s policies would not be fustrated by a different result.) But, more importantly from a constitutional point of view, these District policies are not central to D.C.'s "sovereign responsibilities" while law enforcement is plainly central to Virginia's sovereign responsibilites. Nor is the D.C. Circuit's analysis at all responsive to the central concern of *both* the majority and the dissenters in *Nevada v. Hall* —namely, the effect of these decisions on cooperative federalism.

With respect to the considerations set out in *Nevada v. Hall*, this case differs in five critical respects.

(a) *In this case the sister state's sovereignty is severely infringed because important sovereign interests are at stake here, when they were not at stake in Nevada v. Hall.* The Court in *Nevada v. Hall* made it crystal clear that its holding was limited to situations where application of the forum state's immunity law posed no threat to the foreign state's sovereign interests. In that case, an employee of the University of Nevada had driven to California to pick up an order of television parts, and was involved in a traffic accident there. Subsequently, a California jury awarded a verdict of $1,150,000 against his employer, the State of Nevada, applying California law of unlimited liability. Nevada law would have limited the state's liability under the same circumstances to $25,000.

While the employee in *Nevada v. Hall* was in California on state business, he was not performing any func-

tion which was central to the state's ability to govern. The instant case is totally different. The Arlington County police officer was in the District of Columbia on a far different mission than the Nevada employee in California. He had entered the District in fresh pursuit of persons whom he believed to have committed a felony in Virginia. The interception and arrest of these wrongdoers were important to Virginia. The police officer's purpose was to enforce the felony laws of Virginia and the United States, a function crucial to the ability of the State of Virginia to govern. Virginia's obvious and strong interest in enforcing its criminal laws plainly involves the state's sovereign interests. Such was not the case in *Nevada v. Hall.*

(b) *Many of the law enforcement activities on which liability was based in this case occurred in the sister state, and not exclusively in the forum state—a critically important difference from Nevada v. Hall.* The police officer's training and supervision, the approval of his actions and dispatch of back-up assistance—all critical aspects of Virginia's essential function of enforcing its law—*took place in Virginia.* The D.C. Circuit's opinion allows D.C. juries and D.C. courts to assess and pass judgment on law enforcement practices of Virginia police departments that occurred in Virginia and that are immune from suit in Virginia. In *Nevada v. Hall,* in contrast, the only act challenged was the negligent driving committed entirely in California, and both the majority and dissenters in that case sought "to confine [the Court's] holding to . . . torts committed outside the defendant State." 440 U.S. at 429 (dissenting opinion); 440 U.S. at 424 n.24 (majority opinion).

(c) *The forum state in this case treated the foreign state differently than it would have treated itself—precisely the reverse of the situation in Nevada v. Hall.* In *Nevada v. Hall* the California court treated the state of Nevada exactly as it would have treated the state of California under the same circumstances. The California

statute in question provided that a public entity was liable for injuries resulting from the negligent operation of motor vehicles by public employees within the scope of their employment. It applied equally to California and foreign state entities. The majority in *Nevada v. Hall* specifically emphasized that California had adopted a single compensation policy that would apply to all—"whether those others be residents or nonresidents, agents of the State, or private citizens." 440 U.S. at 426.

In the present case, precisely the reverse is true.

The District of Columbia has waived its immunity for torts committed in the operation of emergency vehicles *only* in cases of gross negligence by its employees. But the D.C. Circuit refused to apply that standard to the operation, within the District, of an emergency vehicle operated by an employee of a Virginia county. The D.C. Circuit's opinion asserts that the statute in question should be interpreted to apply only to District vehicles and that non-District vehicles should be held to a *higher* standard. Thus the D.C. Circuit held not merely that Arlington County was liable for injuries resulting from the operation of its emergency vehicle in the District, but also that Arlington County should be held to a higher standard of care:

> Against this clear legislative statement of an intent to limit the applicability of the gross negligence standard to District liability for damages caused by District vehicles, we would be hard put to accept defendants' argument that the standard applies to them. This is especially true given the natural concerns—proved accurate in this case—that District emergency vehicles have both a greater responsibility and a greater ability to respond to emergencies in the District, and particularly in crowded metropolitan areas at lunchtime, than do non-District vehicles.

738 F.2d at 1364.

The anomalous result of this interpretation of the law is that Arlington County is not only in a worse position

than it would have been if the accident had occurred in Virginia, where it is immune from suit. It is in a worse position than the District would have been if the accident had involved a District police officer and had occurred in the District. Such discriminatory overreaching by a forum state can only lead to friction and retaliatory measures betwen jurisdictions, and cannot have been contemplated by *Nevada v. Hall.* The four cases discussed at pp. 14-17 below demonstrate that this friction is in fact materializing.

(d) *In this case the forum state's policies would not have been frustrated by application of the sister state's immunity law—a critically important difference from Nevda v. Hall.* Two separate but related policies of the District of Columbia are relevant. First, the District has demonstrated that it weighs law enforcement more heavily than compensation by waiving its own sovereign immunity for negligent police chases only when a policeman has been grossly negligent. Second, by Act of Congress, the District has expressly approved and encouraged entry into the District by Arlington County police officers in pursuit of escaping felons in the District's Fresh Pursuit Act. D.C. Code Ann. § 23-901. Thus, Congress has declared it to be D.C. policy to support cooperative law enforcement efforts by out-of-state law enforcement agencies engaged in fresh pursuit of criminals. Thus, application of Virginia's sovereign immunity rules would be consistent with the District's policy to encourage interstate law enforcement and to recognize that compensation interests must yield in some circumstances to law enforcement interests.

(e) *The D.C. Circuit's opinion interferes with the federal interest in promoting cooperative interstate law enforcement.* The Arlington County officer was acting in furtherance of federal interests in this case in at least three respects. (a) The officer was seeking to enforce federal criminal law against bank robbery. (b) The officer was acting to apprehend felons who were crossing state

lines to avoid arrest, in violation of federal laws against such interstate flight. (c) The officer was acting pursuant to an Act of Congress specifically addressed to promoting law enforcement by fresh pursuit of felons into the District. These considerations were not present in *Nevada v. Hall.* The essence of the Full Faith and Credit Clause is to preserve cooperative federalism in the service of the common federal interest of the Nation. Yet the D.C. Circuit's interpretation of *Nevada v. Hall* and the Full Faith and Credit Clause frustrates rather than advances the federal interest in this case.

Nevada v. Hall clearly permits the District to hold foreign governments of their agents liable for acts committed within the District where those acts do not implicate fundamental state interests of the foreign state's law and where enforcement of the foreign state's law is obnoxious to the policies of the forum state. But the District cannot constitutionally hold Virginia to a higher standard than that to which it holds itself. The Full Faith and Credit Clause requires that the foreign state's laws be enforced where the acts of the foreign state are essential to the protection of its sovereign interests, and where enforcement of the foreign state's law is consistent with, not obnoxious to, policies of the forum state. That is the case here.

In sum, the D.C. Circuit's opinion creates precisely the "substantial threat to our constitutional system of cooperative federalism," 440 U.S. at 424 n.24, that was *not* present in *Nevada v. Hall.*

4. This Court should correct a growing tendency of lower courts to misinterpret *Nevada v. Hall* to permit a forum state to refuse to enforce a sister state's immunity rules even if such a refusal interferes with a sister state's capacity to fulfill its own sovereign responsibilities.

The issue presented by this case is of far reaching importance both to individual states and to the basic system of cooperative federalism embodied in the Consti-

tution. Increasingly, state courts have taken this Court's opinion in *Nevada v. Hall* as a license to impose liability on the governmental acts of a sister state without regard to whether such liability interferes with the sister state's capacity to carry out its sovereign responsibilities. In particular, state courts have relied on this Court's opinion in *Nevada v. Hall* as authority to impose liability on a sister state's exercise of important sovereign functions as well as authority to impose liability for acts carried out by the sister state within the geographic confines of the sister state.

Four examples demonstrate this trend and argue urgently for consideration of this issue by this Court.

(a) The Nevada Supreme Court has ruled that Nevada courts may impose liability on the State of Wisconsin based on allegations that Wisconsin parole officers negligently discharged their duties in Wisconsin (with respect to a parolee living in Nevada) even though Wisconsin law provided immunity from suit with respect to such decisionmaking. *Mianecki v. Second Judicial District Court*, 658 P.2d 422 (Nev. 1983), cert. dismissed for want of final judgment, —— U.S. —— (1983).

(b) The Colorado Court of Appeals has ruled that Colorado courts may impose liability on the State of Texas based on the alleged negligence of state employees in Texas in supervising two juveniles who were in Colorado on a juvenile rehabilitation program. The Colorado court wrote:

> We approve the reasoning of the California court [in *Nevada v. Hall*] and hold that where the injured party is a citizen of this state, injured in this state and sues in the courts of this state, there is no immunity, by law or as a matter of comity, covering a sister state's activities in this state.

Peterson v. Texas, 635 P.2d 241, 243 (Colo. App. 1981).

(c) The Supreme Court of Minnesota has ruled that Minnesota courts may impose liability on an Iowa county based on the alleged negligence of the Iowa county in failing to signpost adequately an Iowa county road. The Minnesota court's entire discussion of any constitutional limits consisted of two sentences:

> There is no barrier to asserting personal jurisdiction over Osceola County because of its status as a political subdivision of the State of Iowa. In *Nevada v. Hall*, the Supreme Court held that a state was not constitutionally immune from suit in the courts of another state.

Wendt v. County of Osceola, Iowa, 289 N.W.2d 67, 69 (Minn. 1979). Thus *Nevada v. Hall* became a blank check despite the fact that all actions occurred in the sister state and the fact that core governmental functions were at stake.

(d) The Supreme Court of Iowa held that the State of Illinois could be sued in Iowa state court in a wrongful death action brought for the alleged negligence of the State of Illinois in improperly maintaining a bridge over the Mississippi River. *Struebin v. Iowa and Illinois*, 322 N.W.2d 84 (Iowa 1982). The State of Illinois argued that *Nevada v. Hall* should not be read to allow "state court jurisdiction over sister states where liability is alleged based on the sister state's exercise of a governmental function." 322 N.W.2d at 86. The Iowa Supreme Court, however, rejected Illinois' argument concluding that *Nevada v. Hall* enunciated "an authoritative general principle that the Constitution does not mandate interstate comity" and that footnote 24 of *Nevada v. Hall* "does not necessarily limit the holding to the *Hall facts*." 322 N.W.2d at 86.

In short it is plain that forum states have begun to assert the authority to impose liability standards on actions of a sovereign sister state that go to the core of

the governmental and sovereign activities of the sister state. Forum states have even asserted this authority when all acts by the sister state have occurred in the sister state. Petitioners submit that these decisions create precisely the type of clashes between sovereigns that the Full Faith and Credit Clause should prevent. *Nevada v. Hall* never intended to sanction such decisions and such overreaching by forum states. This Court must step in to correct this developing threat to the federalism embodied in the Constitution.

5. This Court should prevent the discriminatory treatment of foreign police officers performing their duties in another state as such treatment, in violation of the Privileges and Immunities and Equal Protection Clauses, impairs the fundamental unity of the Nation.

The Privileges and Immunities Clause, U.S. Const. art. IV, § 2, "imposes a direct restraint on state action in the interests of interstate harmony" thus reflecting "concerns of central import to the Framers [of the Constitution]" *United Building and Construction Trades Council v. Camden*, 465 U.S. ——, ——, 104 S. Ct. 1020, —— (1984); *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). Indeed, analysis of the Clause by this Court has

> emphasized nationalism, the proscription of discrimination, and the assurance of equality of all citizens within any state: '. . . It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.'

Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 380-81 (1978) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)) (footnotes omitted). Yet the decision of the court below strikes at the heart of the function of the Privileges and Immunities Clause. *See Hicklin v. Orbeck*, 437 U.S. 518 (1978). By ap-

plying a higher standard of liability to a Virginia police officer than would be applied to a D.C. officer (and a higher standard of liability to Arlington County than would be applied to D.C.), the court below engages in the type of parochial legislation, and invites the type of legislative and judicial retaliation, that the Privileges and Immunities Clause was intended to prevent. *See Austin v. New Hampshire*, *supra*, 420 U.S. at 662-63; *Toomer v. Witsell*, 334 U.S. 385 (1948). Such a warping of the functions and purposes of the Privileges and Immunities Clause should not be tolerated.

Furthermore, the court below, by applying a higher standard of liability to Officer Kyle, discriminated against petitioner Kyle merely because he works for an out-of-state municipality. Such discrimination offends the principles of the Equal Protection Clause, U.S. Const. amend. XIV, § 1.[3] This Court has applied that Clause to strike down differences in treatment based upon whether individuals were from in-state or out-of-state. *See generally Hicklin v. Orbeck*, *supra*; *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Troyer v. Town of Babylon*, 483 F. Supp. 1135, 1140 (E.D.N.Y.), *aff'd*, 628 F.2d 1346 (2d Cir.), *aff'd sub nom. Town of Southampton v. Troyer*, 449 U.S. 988 (1980). This case presents for decision the issue of whether discriminatory treatment of an out-of-state police officer violates the Equal Protection Clause and demonstrates the need for such protection.

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[3] The principles of the Equal Protection Clause are made applicable to the District of Columbia through the Due Process Clause, U.S. Const. amend V. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

CONCLUSION

For the reasons set out above, petitioners respectfully pray that this Court grant this petition and issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1965

ALVIN B. BISCOE, JR.,
ELEANOR L. BISCOE, HIS WIFE

v.

ARLINGTON COUNTY,
Appellant

ARLINGTON COUNTY POLICE DEPARTMENT, *et al.*

No. 83-1966

ALVIN B. BISCOE, JR.,
ELEANOR L. BISCOE, HIS WIFE

v.

ARLINGTON COUNTY, *et al.*

MICHAEL KYLE,
ARLINGTON COUNTY POLICE DEPARTMENT,
Appellant

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 80-0766)

Argued April 16, 1984

Decided July 6, 1984

William D. Dolan, III, with whom *William A. Kaplin* and *Charles G. Flinn* were on the brief for appellant, Arlington County, in No. 83-1965.

Paul F. Sheriden, for appellant, Kyle, in No. 83-1966.

Joseph H. Koonz, Jr., with whom *Carolyn McKenney*, *Roger C. Johnson* and *Patrick M. Regan* were on the brief for appellees, *Alvin Biscoe, et al.*, in Nos. 83-1965 and 83-1966. *Jill Robinson* and *William P. Lightfoot* also entered appearances for appellees.

Before TAMM and EDWARDS, *Circuit Judges*, and HAYNSWORTH,* *Senior Circuit Judge*, United States Court of Appeals for the Fourth Circuit.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This case involves the liability of Arlington County, Virginia, and one of its police officers, for serious injuries to an innocent bystander arising out of a negligent high-speed police pursuit of a suspected bank robber into the District of Columbia. As a result of the negligent pursuit, the plaintiff, Alvin Biscoe, had one of his legs severed and the other severely injured, ultimately requiring amputation. A jury returned a verdict in favor of the injured plaintiff and his wife, and the County and its officer have appealed. We affirm.

I. BACKGROUND

Late in the morning of September 29, 1979, Lyntellus Brooks and Orlando Durantes robbed the Arlington, Virginia branch of the Washington-Lee Savings & Loan Association. Shortly thereafter, an alarm was broadcast to all Arlington County Police Department ("ACPD") units; some of these units went to the robbery scene, and others to probable escape routes in the County. Police

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

radio broadcasts alerted units to look for the persons who had been involved the previous day in a robbery of the Potomac Savings and Loan Association, and informed them that the car used in that robbery was a green Dodge Dart or Plymouth Duster, with a District of Columbia license plate.

Officer Michael Kyle responded to the alert by positioning his cruiser eastbound along Route 50. About nine minutes after the initial bank alarm transmission, he spotted a light green car driven by a man who resembled pictures of a suspect from the Potomac bank robbery that Kyle had seen the day before. A woman was seated beside the driver. Kyle radioed his suspicion regarding the driver and began to follow the green car along Route 50, with each car traveling within the speed limit. Kyle followed the car onto the Theodore Roosevelt Bridge (which connects Virginia with the District of Columbia), pulled in behind it, and turned on his overhead lights and siren. The car took the E Street Ramp off the Bridge into the District of Columbia, slowed to a stop in the breakdown lane of the ramp, and came to rest three car lengths in front of the police car. Before the stop, the ACPD dispatcher broadcast that the District of Columbia ("D.C." or "District") and United States Park Police were being notified. Also before the stop, Kyle radioed that the car appeared to have a third passenger—another woman—in the back seat.

Once stopped, Brooks, the driver of the car, immediately got out of his vehicle and walked toward Kyle with his hands in the air, leaving his car door open. Kyle got out of his cruiser, with his portable radio in hand, and notified the dispatcher that he had made the stop. Whether the officer also had his revolver drawn at this time was a matter of considerable dispute at trial. Kyle turned Brooks around, walked him back to his car, had him put his hands on the trunk, and ordered him to stay there.

According to plaintiffs' evidence, Kyle did not tell Brooks to turn off the car motor, throw his keys to the ground, or shut the car door; he did not instruct him to lie on the ground; and he did not handcuff or frisk him. Instead, the officer turned to the passenger side of the car to look in the back seat, and, with his hand radio, broadcast his location and requested a clothing description of the bank robbery suspects. While Kyle was so preoccupied—leaving Brooks wholly unattended and unrestrained—Brooks ran to his side of the car, jumped in and drove off. Brooks testified that he was able to make a quick escape because he had left the engine running and the car door ajar. Trial Transcript ("Tr.") at 31.

Kyle informed his dispatcher of the departure and returned to his car. With his lights flashing and his siren blaring, he pursued Brooks down the E Street Expressway and through the tunnel. Kyle radioed that a fourth passenger in the car was shooting at him, and also that, "I don't know where I'm at." Tr. at 332-33. Brooks, who by now was well within the city limits of the District of Columbia and traveling at more than 70 to 80 m.p.h., drove through a red light at 20th Street and sped toward the 19th and E Street intersection. The speed limit over this distance was 30 m.p.h. until one and a half blocks before the intersection, at which point it dropped to 25 m.p.h. Kyle, who knew neither his speed nor the speed limit, followed. Tr. at 332-33, 338. Plaintiffs contend that the officer averaged 55.38 m.p.h. over this distance and that his speed during the chase increased to 80 m.p.h. Defendants dispute this assertion, but do not deny that Kyle was traveling well in excess of the speed limits.

As Brooks approached the intersection, he saw a car traveling south on 19th Street into the intersection. Brooks' car struck that vehicle and careened off into the southeast corner of the intersection, where it pinned a pedestrian, Alvin Biscoe, against a light pole. The im-

pact, which knocked Biscoe in the air, severed one of his legs and severely injured the other, ultimately requiring amputation.

Officer Kyle, who had by then arrived on the scene, saw Brooks flee from his car. Kyle removed his shotgun and followed. When Kyle reached Brooks, the suspect had been restrained by pedestrians. Kyle hit Brooks on the right side of his head with the butt of the shotgun. Soon thereafter, other police from various jurisdictions, as well as the United States Park Police helicopter, arrived on the scene.

Alvin Biscoe and his wife Eleanor filed a suit for damages against numerous parties, including Officer Kyle, Arlington County, and Brooks. They asserted that from the time Kyle first stopped Brooks' car on the E Street Ramp in the District of Columbia, the officer committed violations of a series of generally accepted police standards—in particular, in his conduct of the felony stop and the high-speed pursuit—which resulted in the accident. Moreover, they claimed that Officer Kyle violated Arlington County regulations that specifically prohibit its officers from engaging in high speed chases—defined as greater than 20 m.p.h. above the speed limit—in the District of Columbia.[1] In addition, they alleged that Arling-

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[1] Arlington County Police Department, Departmental Directive No. 74-4, provides in relevant part:

> I. PURPOSE: The purpose of this directive is to announce Departmental policy and describe procedures for "hot pursuit" of violators of the criminal and traffic laws of the Commonwealth and the County.
>
> II. POLICIES:
>
> A. *Pursuit in Arlington County*
>
> 1. It is the policy of this Department that pursuit at *high* speeds is justified only in those instances where the officer has personal knowledge or reasonable cause to believe that the person being pursued has committed or attempted to commit a felonious act which

ton County's negligent training and supervision of Officer Kyle were a cause of the accident that injured Alvin Biscoe. After an 11-day trial, a jury returned a verdict

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resulted in or could have resulted in death or serious bodily injury.

2. Pursuit at lesser speeds is permitted, where necessary, to apprehend other felons, misdemeanants, and traffic violators. *High* speed pursuit of such violators in an area as geographically compact and heavily populated as Arlington County would be potentially more hazardous than permitting the violator to escape apprehension.

3. *High* speeds are defined for the purpose of this directive as speeds more than 20 miles per hour in excess of posted speed limits. This definition is in the nature of a guideline and must be interpreted in light of road conditions, weather, time of day, density and flow of traffic, and the nature of the surrounding area. The decision to initiate, continue and terminate pursuit must be at the discretion of the officer after due consideration of the seriousness of the offense, possible consequences and safety of all concerned. Where a pursuit has occurred, the absence of evidence to the contrary will be presumptive evidence that the officer was in compliance with Departmental orders, rules and regulations.

B. *Pursuit Elsewhere in Virginia*

. . . .

C. *Pursuit in the District of Columbia*

1. *Under no circumstances* will an officer pursue a misdemeanant or traffic offender into the District of Columbia. An officer from this Department has no authority to arrest in the District for a misdemeanor or traffic violation and may not request the assistance of a District officer in making such an arrest.

2. When pursuing a known felon or a person whom the officer has reasonable cause to believe has committed a felony, and the pursuit appears likely to enter the District of Columbia, all possible means will be utilized to notify the District police of such fact and to describe in detail the vehicle and, where possible, the

finding that defendant Kyle was negligent in his conduct of the felony stop on the bridge and negligent in his high-speed pursuit of Brooks' vehicle, and that his employer, Arlington County, was similarly liable on a theory of *respondeat superior*. The jury also found that defendant Arlington County was negligent in its training and supervision of Kyle, and that defendant Brooks was negligent as well. The jury additionally found that all defendants' acts and omissions proximately caused the injuries to the plaintiffs. It awarded $4 million to Alvin Biscoe and $1 million to Eleanor Biscoe; the award to Eleanor Biscoe was reduced on remittitur to $350,000.

II. Discussion

Defendants Kyle and Arlington County appeal the judgments against them on a number of grounds, principally involving pure questions of law. We have carefully reviewed each claim and have found none to merit reversal or remand. Accordingly, we affirm.

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occupants. *High* speed pursuit in the District is prohibited. Pursuit at reduced speeds is permissible until the vehicle can be stopped or until District officers join the pursuit. At such time as District officers begin pursuit, the Arlington unit will discontinue direct pursuit and proceed, without emergency equipment, in the direction of the pursuit or to the scene of the apprehension as directed by the dispatcher.

3. Only the immediately pursuing officer will enter the District of Columbia unless other units are dispatched to assist an officer in trouble.

4. An arrest for a felony committed in Virginia may be made in the District by an Arlington officer. *Under no circumstances*, however, will such person be returned to Arlington without being processed through the District of Columbia judicial system.

D. *Pursuit into Maryland*

Pursuit into Maryland will be governed by the foregoing rules for the District of Columbia.

A. *Immunity Issues*

1. *Sovereign Immunity*

Initially, defendant Arlington County asserts that the District Court improperly declined to recognize the immunity from tort claims that the County retains *under Virginia law.* In support of this assertion, Arlington County argues that the United States Constitution's Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, compels application of Virginia immunity in this case, that principles of comity require that Virginia's immunity be recognized in the District, and that the District's choice of law rules require adoption of that aspect of Virginia law.

The first of these arguments may be readily dismissed on the basis of the Supreme Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), which held that federal constitutional law does not prohibit one state's courts from entering a judgment against or asserting jurisdiction over another sovereign state. In *Hall*, plaintiffs sued Nevada in a California court for injuries suffered in a traffic accident allegedly caused by a Nevada state employee driving in California. Nevada had argued that under the Constitution it was immune from suit in courts of another state, but the California Supreme Court decided that the issue of Nevada's immunity from suit in California was controlled solely by California law, and that California would not extend immunity to Nevada as a matter of comity. *Hall v. University of Nevada*, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972) (en banc), *cert. denied*, 414 U.S. 820 (1973). After a remand and trial, the United States Supreme Court affirmed the California court's judgment against Nevada, broadly holding that nothing in the federal Constitution requires a state to accord immunity to another, and therefore that the Constitution imposes no special limits on states' power to authorize their courts to as-

sert jurisdiction over another state.[2] It rejected arguments both that the Constitution implicitly gives states immunity in courts of other states, and that the Full Faith and Credit Clause requires a forum state to resort to the law of the defendant state to determine its amenability to suit. Justice Stevens responded to Nevada's Full Faith and Credit Clause claim with the explanation that the clause does not require a state to apply the law of another state in violation of its own legitimate public policy. *Nevada v. Hall*, 440 U.S. at 422. Finally, the Court made clear, a forum state might defer to a sister state's retained immunity, even though it need not do so.

To determine whether the Full Faith and Credit Clause requires that the District apply Virginia's law regarding the immunity of its counties, we must ascertain the District's policies and determine whether they would be violated by application of Virginia law. *See Nevada v. Hall*, 440 U.S. at 422 ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."); *Mianecki v. Second Judicial District Court*, —— Nev. ——, 658 P.2d 422, 424 (holding that clause does not require recognition of Wisconsin's immunity rules when they conflict with Nevada's policies), *cert. dismissed*, 104 S. Ct. 195 (1983). Under Virginia law, counties are fully immune from suit in tort, at least in Virginia

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[2] *Nevada v. Hall* was initially a state court action and therefore did not implicate the Eleventh Amendment, which by its terms applies only to federal courts. Similarly, because the case we consider involves a suit against a county, the Eleventh Amendment is not implicated. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 690 (2d ed. 1973) ("A suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment.") (citing *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1869); *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961)). No party suggests otherwise.

courts. *Mann v. County Board*, 199 Va. 169, 98 S.E.2d 515 (1957); *Fry v. County of Albemarle*, 86 Va. 195, 9 S.E. 1004 (1889). Under District of Columbia law, the District enjoys immunity from suit only if the actions in question are committed in the exercise of a "discretionary" function. *Wade v. District of Columbia*, 310 A.2d 857, 860 (D.C. 1973) (en banc). Since the plaintiffs' claims against the appellant County are based on its negligent performance only of nondiscretionary acts,[3] had those acts been committed by the District of Columbia Metropolitan Police Department, sovereign immunity would not bar suit against the District. Forced application of Virginia's law would therefore frustrate the policies that underlie the District's immunity rules; under *Nevada v. Hall*, the District is not required to honor Virginia's claim of sovereign immunity under such circumstances. *See Mianecki*, —— Nev. at ——, 658 P.2d at 424 (applying *Nevada v. Hall* in this way); *Struebin v. State*, 322 N.W.2d 84, 85-86 (Iowa) (same), *cert. denied*, 459 U.S. 1087 (1982). We need not decide, as the Supreme Court did not, whether the clause requires application of a sister state's immunity rules when they are not in conflict with policies of the forum state.

The potential sweep of the Supreme Court's holding—which, as Justice Blackmun pointed out in dissent, *Nevada v. Hall*, 440 U.S. at 428-29 (Blackmun, J., dissenting), could be read to authorize suit in a foreign forum against a state for acts committed within its own territory—led the Court to assure, in a footnote, that

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its

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[3] *See* section II(A)(2), *infra*.

> own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

440 U.S. at 424 n.24. Arlington County urges this footnote upon us as support for its position that under the facts of this case, the Full Faith and Credit Clause *requires* the application of Virginia's immunity rules. Overlooking the considerable and significant similarities between the District's interest in this case and that of California in *Nevada v. Hall*—in both cases, the forum state is the site of a traffic accident involving an employee of a foreign jurisdiction—Arlington County maintains that the District's failure to apply Virginia's immunity rules in this case undermines the County's capacity to fulfill its law enforcement responsibilities.

We find the County's position to be seriously flawed. First, the cited footnote points out that the facts of *Nevada v. Hall* did not threaten Nevada's sovereign responsibilities, but does not in any respect limit the holding to the facts of that case. Nor does the footnote suggest that an exception must ever be made to the principles articulated in the opinion. Second, to the extent that the footnote was meant to carve out an exception to the broad principle that the opinion establishes—to wit, that the Constitution does not mandate interstate comity—we have no doubt that this is not the kind of exceptional case the footnote was meant to address. For one, Arlington County itself expressly recognizes that its law enforcement interests weaken—and will yield to other interests—when it acts outside Virginia's borders. The County's *prohibition* on high-speed police chases in Maryland and the District of Columbia makes this recognition pristinely clear. *See* note 1, *supra*. Also, the situation in this case, in which a Virginia county acted *outside* Virginia territory, obviously is wholly different

from one in which a Virginia county has acted *within its borders*, or those of the state, and is sued in the courts of a sister state. The activity at issue here represents an extremely narrow slice of the County's law enforcement endeavors and, most importantly, unlike much else that the County police do, this activity also directly implicates the sovereignty of another entity. The result is that the threat to the County's sovereignty is considerably less, and the threat to another entity's sovereignty is considerably greater than in the scenario just described, where a state has acted only within its borders. In sum, application of Virginia's policy of immunity would clearly frustrate District policies in favor of deterrence and compensation, and the facts of this case warrant no further inquiry into the meaning of the quoted footnote. *See Struebin v. State*, 322 N.W.2d at 86 (considering *Nevada v. Hall* footnote, concluding that Illinois is not immune from suit in Iowa for alleged failure to maintain bridge); *see also Peterson v. Texas*, 635 P.2d 241 (Colo. Ct. App. 1981) (Texas not immune from Colorado suit based on alleged tort of youth participating in Colorado in a Texas juvenile rehabilitation program); *Wendt v. County of Osceola*, 289 N.W.2d 67 (Minn. 1979) (Iowa county not immune from suit in Minnesota for alleged failure to post adequate road signs). Accordingly, we hold that the federal Constitution does not require recognition of Virginia's immunity rules in this case, and that resolution of the issue is left, as in *Nevada v. Hall*, to state law.

We turn then to the County's second argument—that it is immune from suit in the District under principles of comity. *Nevada v. Hall* left open the possibility that a state might, as a matter of comity, recognize another state's immunity. The District of Columbia Court of Appeals, sitting *en banc*, has expressly declined to do so, however, and, as a court with diversity jurisdiction, we are bound to that determination. In *Qasim v. Washing-*

ton Metropolitan Area Transit Authority, 455 A.2d 904, 906 (D.C.) (en banc), *cert. denied*, 103 S. Ct. 2090 (1983), the court of appeals considered and rejected an argument that WMATA, as an agency of each sovereign signatory to the interstate compact that created it, is clothed with the sovereign immunity granted by the Eleventh Amendment to its parent states. Without deciding *whether* WMATA would, in a proper case, be protected by the Eleventh Amendment, the court wrote,

> [T]he doctrine does not bestow immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign. Immunity in the courts of another sovereign "must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Nevada v. Hall*, 440 U.S. 410, 416, 99 S.Ct. 1182, 1186, 59 L.Ed.2d 416 (1979). The WMATA Compact contains no agreement, express or implied, granting immunity to a signatory from suits involving WMATA brought in the courts of the other two signatories. *Thus Maryland and Virginia do not have sovereign immunity from suits brought in the District of Columbia courts.*

455 A.2d at 906 (emphasis added). We could scarcely imagine a more straightforward statement that the District of Columbia courts, whose rules on comity we must follow in a diversity action, will decline to recognize the sovereign immunity of Virginia or its counties. *See also Daughtry v. Arlington County*, 490 F. Supp. 307, 312-13 (D.D.C. 1980) (declining to recognize the County's immunity claim). We therefore decline to do so. Against this background, we simply have no reason to believe that the District of Columbia courts would give effect to Virginia's law out of deference or respect, when that law is contrary to the policies of the District. *See Mia-*

necki, —— Nev. at ——, 658 P.2d at 425 (declining, as a matter of comity, to adopt policy of Wisconsin that is contrary to policy of Nevada).

Finally, the County argues, proper application of the District's choice of law principles requires application of Virginia's rules on the immunity of its counties. The District of Columbia Court of Appeals' treatment of immunity in *Qasim* leaves us uncertain whether choice of law principles are even applicable in this context, or whether our inquiry under D.C. law properly ends after resolution of the comity issue. The *Qasim* court did not identify District of Columbia and Virginia laws on the immunity of agents of the sovereign; it simply concluded that it need not, and would not, import any immunity Virginia might retain in its own courts for its agents.

We also note that state courts faced with claims of immunity either by sister states, or by their lesser governmental units, have resolved the issue by reference to the forum state's policy on comity, not by rigid application of choice of law rules. *See, e.g., Mianecki v. Second Judicial District Court*, —— Nev. ——, 658 P.2d 422, *cert. dismissed*, 104 S. Ct. 195 (1983); *Struebin v. State*, 322 N.W.2d 84 (Iowa), *cert. denied*, 459 U.S. 1087 (1982); *Peterson v. Texas*, 635 P.2d 241 (Colo. Ct. App. 1981); *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 404 N.E.2d 726, 427 N.Y.S.2d 604 (1980). The rationale for this approach is not entirely clear. One explanation might be that each state's immunity law is perceived as addressing only its immunity in its own courts, and therefore is not susceptible to application in the courts of another state. This explanation would be consistent with the view, espoused by the California Supreme Court in *Hall v. University of Nevada*, 8 Cal.3d 522, 105 Cal. Rptr. 355, 503 P.2d 1363 (1972) (en banc), *cert. denied*, 414 U.S. 820 (1973), that the sovereignty of one state does not extend into that of another state, so as to create immunity from suit there, but instead ends

at the state boundary. Another possible source of the state courts' analytical framework is the proposition that once a state court concludes that another state's immunity rule conflicts with its own, and will not apply as a matter of comity, the outcome of the state's choice of law analysis is inevitable.[4] It is also possible that defendant states have waived immunity at home, albeit not in sister states, and, therefore, their laws on immunity are not truly in conflict with those of the sister states. Finally, it is conceivable that the state courts view immunity as a threshold issue, to be resolved along with certain procedural and jurisdictional matters, solely by reference to forum state rules.

The District of Columbia courts have not expressly considered whether choice of law principles are relevant, as a matter of D.C. law, to the decision whether to recognize a sister state's immunity rules; the parties have not raised this issue at all but instead simply have assumed that choice of law analysis applies. Nor must we resolve the question here, because we have no doubt that under the District's choice of law rules, District of Columbia law applies on this issue. Accordingly, in the belief that the question is one that the District of Columbia Court of Appeals should properly resolve in the first instance, we will simply assume *arguendo* that the local court would resolve this issue by reference to its choice of law rules.

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[4] Of course, under the *lex loci delicti* choice of law rule directing courts to apply the law of the site of the wrong, this result is not inevitable. Indeed, that scenario counsels against application of choice of law principles to resolve the immunity issue. Virginia follows *lex loci delicti* principles in determining which law to apply. *See McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662 (1979). Yet, had this case been brought in Virginia state court, we would not expect that Virginia would apply District rules on immunity to the County to determine its suability, but instead would treat the issue as a threshold one of amenability to suit controlled by Virginia law.

The District of Columbia adopts the governmental interest analysis approach to resolve choice of law questions. *Williams v. Williams*, 390 A.2d 4, 5 (D.C. 1978). This approach requires a court "to evaluate the governmental policies underlying the applicable conflicting laws and to determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Id.* at 5-6 (footnote omitted). When the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law, a false conflict appears and the law of the interested state prevails.[5] Where each state would have an interest in application of its own law to the facts, a true conflict exists and the law of the jurisdiction with the stronger interest will apply. *See, e.g., Mazza v. Mazza*, 475 F.2d 385, 392 (D.C. Cir. 1973) (applying the law of the jurisdiction whose interest, on balance, was more significant).

There can be no doubt that this case presents a true conflict, and that the District Court properly resolved that conflict in favor of the law of the District. As a general matter, the immunity of Virginia's counties primarily reflects the state's concern for the financial integrity of its counties—a concern which, we have little doubt, can amply be met with the purchase of liability insurance. Immunity no doubt also reflects the state's concern that the prospect of liability will deter police officers from proper performance of their duties. These concerns generally might give Virginia a strong interest in its counties' continued immunity. However, that interest is considerably weakened when viewed in light of both the facts of this case and Virginia's official and governmental immunity scheme. First, Virginia's police officers are not immune from liability in this context, and their personal amenability to suit no doubt accomplishes at

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[5] *See* Milhollin, *The New Law of Choice of Law in the District of Columbia*, 24 CATH. U.L. REV. 448, 450 (1975).

least some of the deterrence that it is feared would result were the County liable as well. *See Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Second, under District law the County is liable only for negligent performance of nondiscretionary acts, which by definition leave to the Government actor little choice on procedure; the only actions deterred would be violations of a state's orders to its employees. Third, much as the prospect of liability might thwart discretionary decisionmaking, it may also deter misconduct, particularly in a nondiscretionary context. Fourth, the state of Virginia recently has waived its immunity from suit in tort in certain cases, although limiting the amount recoverable. *See* Virginia Tort Claims Act, VA. CODE § 8.01-195.1 (1983 Supp.). This enactment, although not applicable to the counties, displays Virginia's awareness of the modern trend away from, and the absence of a need for sovereign immunity. *See* Taylor, *A Re-Examination of Sovereign Tort Immunity in Virginia*, 15 U. RICH. L. REV. 247 (1981). Thus, in the context we confront, the concern for deterrence is weak, if existent, and we are only left with Virginia's concern for the economic well-being of its counties. This concern, limited to the rare tort suit *arising out of acts outside Virginia*, simply is not an especially compelling one, particularly given the availability of liability insurance.

In contrast, the District's interest is plainly significant. Generally, a governmental entity's waiver of immunity signifies its dual interests in deterrence of potential tortfeasors and compensation of injured parties. Given the facts of this case, the former is strongly implicated, and the latter less so. First, as the site of most of the relevant conduct and all the injury, the District has a strong interest in deterring conduct of this kind. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 comment d (1971) (When conduct and injury occur in the same state, that state usually will be the state of dominant interest, since the two principal elements of

the tort, conduct and injury, occurred within its territory. "The state where the defendant's conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character. Similarly, [it] will, usually at least, have the dominant interest in determining whether the interest affected is entitled to legal protection."). The defendants' acts "created the precise danger to District life and property" [6] that various District and Arlington County regulations sought to prevent, and liability would discourage such acts. Moreover, while a compensatory policy "has the greatest relevance to cases when the mishap occurs in the District and when District residents are plaintiffs," *Gaither v. Myers*, 404 F.2d 216, 223 (D.C. Cir. 1968), this court has previously recognized the special and largely unique interest of the District in protecting persons who live in the surrounding suburbs and work in the District. As we have observed,

> [T]o confine the benefits of the . . . rule to the territory ceded by the states of Maryland and Virginia to form the Nation's Capital would be to shun the present reality of the economically and socially integrated greater metropolitan area. It is commonplace that residents of Maryland are part of the Washington Metropolitan trading area, and that District residents and businesses have an interest in the well-being of these citizens of the Free State.

Id. at 223. In other words, when a plaintiff such as Dr. Biscoe, who is a Maryland resident working in the District, is injured in the District, District of Columbia courts have recognized a strong local interest in protecting that plaintiff. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 comment e (1971) ("The local law of the state where the personal injury occurred is most likely to be applied when the injured person has a settled relationship to that state, either because he is

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[6] Milhollin, note 5, *supra*, at 454.

domiciled or resides there or because he does business there.").

Nor does the foregoing complete our review of interests the District has in application of its liability rules. In *Qasim*, the District evidenced an unwillingness to embrace Virginia's sovereign immunity rules; thus, to the extent they have spoken, District of Columbia courts have established a local policy against application of this key aspect of Virginia law. The court's rulings on Virginia's immunity in that case, if not dispositive, are surely entitled to great weight. This is especially so when we look to Virginia choice of law rules to ascertain the interest of Virginia in application of its law to the facts of this case. *See Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468, 473-75 (D.C. Cir. 1965) (looking to choice of law rules of Maryland, an interested state, to determine which state's substantive law it would apply), *cert. denied*, 383 U.S. 943 (1966). Under Virginia law, the law of the site of the wrong applies. *McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662 (1979) (reaffirming Virginia's adherence to the rule of *lex loci delicti*—the law of the state where the tort occurs governs the substantive elements of the cause of action). Thus, to the extent that choice of law principles properly determine questions of immunity, Virginia would either apply the District's rules or have to fashion an exception based on its own policies. On balance, we conclude, the District's policies would be substantially more seriously thwarted by nonapplication of its law in this context than would those of Virginia, and we affirm the District Court's choice of law ruling.

2. *Official Immunity*

In an argument adopted by Officer Kyle, the County argues that Officer Kyle is immune from liability in tort for his conduct. Despite its vehement argument that Virginia immunity rules control the issue of the County's

immunity, the County is absolutely silent on the application of Virginia law to the question of an officer's immunity from suit. Nor is this surprising. Under Virginia law, employees of the state may be held liable for negligent conduct. *See Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967) (state employee liable); *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938) (county employee liable); *see also James v. Jane*, 221 Va. 43, 267 S.E.2d 108 (1980) (recognizing that in some contexts state employees may be immune from suit in negligence) (rereported at 282 S.E.2d 864 (1980)). Under District of Columbia law, municipal employees are immune only for tortious conduct in the performance of discretionary functions. *See, e.g., Rieser v. District of Columbia*, 563 F.2d 462, 475 (D.C. Cir.), *vacated*, 563 F.2d 482 (D.C. Cir. 1977) (en banc), *majority opinion reinstated in relevant respects*, 580 F.2d 647, 658 (D.C. Cir. 1978) (en banc). Thus, on this issue, defendants are content not to challenge the District Court's application of District of Columbia law. Instead, the defendant County asserts that Officer Kyle's acts were discretionary, and that he therefore is immune under the District's law. It similarly claims that the acts of which it is accused independently were discretionary, and that it is immune if District of Columbia law applies.

We believe the actions at issue were clearly ministerial and operational, as those terms are defined by the District courts, and that neither Officer Kyle nor the County was immune from suit under local law. District Court Judge Harold Greene ruled against the County on this issue before permitting the case to go to trial, and we agree with his determination.

In the District of Columbia, both official and governmental immunity depend on the ministerial-discretionary dichotomy. The term ministerial "connotes the execution of policy as distinct from its formulation." *Elgin v. District of Columbia*, 337 F.2d 152, 154-55 (D.C. Cir. 1964). In contrast, "If policy considerations were involved and

no statutory or regulatory requirements limited the exercise of policy discretion, . . . immunity would bar suit." *Chandler v. District of Columbia*, 404 A.2d 964, 966 (D.C. 1979). In other words,

> there are certain decisions made in the exercise of the *discretionary* functions of government for which there is no reason to believe a jury would render a sounder decision than those officials chosen, qualified, and prepared to make them. It is these that are labeled "discretionary" and which constitute policy decisions deemed immune from suit because there is no legal standard by which a judge or jury could gauge their arbitrariness and capriciousness or lack thereof.

Id.

Under existing precedent in this Circuit, we have no doubt that the activities at issue here—supervising and instructing officers, conducting a felony stop, and conducting a felony pursuit—are ministerial, not discretionary, acts. They involve day-to-day operational matters, not planning and policy. Thus, addressing the first of these activities, supervision and instruction, it has been aptly noted that,

> From the very nature of these activities, it is clear that they do not involve the kind of policy-formulating, judgment-making processes encompassed by the term "discretionary." Once the decisions have been made to have a police department, to organize it in a particular way, and to hire a specific individual to be a member of that department, the acts of training, instructing, supervising and controlling the individual officer are merely "ministerial."

Thomas v. Johnson, 295 F. Supp. 1025, 1031 (D.D.C. 1968); *cf. Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) (en

banc).[7] Similarly, regardless whether the initial decision of a police officer to stop or pursue a car is ministerial or discretionary, a police officer's execution of such activities is ministerial. *See Mason v. Bitton*, 85 Wash.2d 321, 534 P.2d 1360, 1365 (1975) (en banc). This is especially so where, as here, the officer is constrained both by regulations and clearly established policy and standards, about which experts can, and have testified. The judgment that limits must be imposed—as for example, on the speed of a vehicle in hot pursuit—indicates that the ACPD already had made the decision to limit the officer's exercise of discretion; imposition of such limits also suggests that effective law enforcement would not be hindered by enforced adherence to such regulations. Similarly, established procedures for the conduct of a felony stop, once the stop has been made, curtail an officer's need or opportunity to make policy decisions on the scene. We therefore need not be concerned that tort liability for such operational actions would "pose threats to the quality and efficiency of government." *Spencer v. General Hospital*, 425 F.2d 479, 482 (D.C. Cir. 1969) (en banc); *see Carter v. Carlson*, 447 F.2d 358, 362-63 & nn.8-9 (D.C. Cir. 1971) (no immunity from suit for tort committed in course of making an arrest), *rev'd in part on other grounds*, 409 U.S. 418 (1973); *Wade v. District of Columbia*, 310 A.2d 857 (D.C. 1973) (en banc). Accordingly, we conclude that the particular acts of which plaintiffs complain are ministerial, and that both Officer Kyle and the County were properly found to be liable for damages.

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[7] Of course, not all actions having to do with training police officers are necessarily operational or ministerial, *see Carter v. Carlson*, 447 F.2d 358, 363-64 (D.C. Cir. 1971) (training and supervision have both ministerial and discretionary components), *rev'd in part on other grounds*, 409 U.S. 418 (1973), but we have no reason to believe, as Judge Greene did not, that plaintiffs' allegations concern anything but the operational aspects of such activity.

B. *Standard of Care*

The record and briefs in this case reflect an extraordinary degree of confusion surrounding the proper standard of care to be applied to the felony stop and pursuit. We conclude that the proper standard for the District of Columbia is that of due care, as limited by the guidelines applicable to Officer Kyle's conduct. *See Mason v. Bitton*, 85 Wash.2d 321, 534 P.2d 1360 (1975) (en banc) (under statute with same language as D.C. regulations, police and other officers have duty to act with due regard for the safety of all persons and property while operating emergency vehicles); *Myers v. Town of Harrison*, 438 F.2d 293 (2d Cir.) (same), *cert. denied*, 404 U.S. 828 (1971). We also conclude that whatever challenge is now raised is waived for failure to preserve it below.

Defendants assert that the proper standard of care to which they should be held is gross negligence. The basis for this argument is a provision of the D.C. Code that expressly waives the immunity of the District for the negligent operation of District-owned vehicles by District employees, except for claims "arising out of the operation of an emergency vehicle on an emergency run," D.C. CODE ANN. § 1-1212 (1981), for which the District is liable only for gross negligence.[8] The Code defines "emer-

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[8] D.C. CODE ANN. § 1-1212 (1981) provides in relevant part:

> Hereafter the District of Columbia shall not assert the defense of governmental immunity in any suit at law in which a claim is asserted against it for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the District occurring as the result of the operation by such employee, within the scope of his office or employment, of a vehicle owned or controlled by the District: Provided, that in the case of a claim arising out of the operation of an emergency vehicle on an emergency run the District shall be liable only for gross negligence.

gency run" to refer to the movement of District-owned vehicles and "employee" to mean an officer or employee of the District. D.C. CODE ANN. § 1-1211(4), (6) (1981). Against this clear legislative statement of an intent to limit the applicability of the gross negligence standard to District liability for damages caused by District vehicles, we would be hard put to accept defendants' argument that the standard applies to them. This is especially true given the natural concerns—proved accurate in this case —that District emergency vehicles have both a greater responsibility and a greater ability to respond to emergencies in the District, and particularly in crowded metropolitan areas at lunchtime, than do non-District vehicles. Moreover, the gross negligence standard of D.C. Code Ann. § 1-1212 obviously does not protect employees, as opposed to the municipality, and surely does not cover Officer Kyle.

That a statute expressly limited to employer liability for damages caused by District vehicles is not intended to apply to non-District vehicles is made particularly apparent by the existence of another regulation explicitly applicable to drivers of both District and non-District vehicles. Under this second provision, Officer Kyle, as the driver of an authorized emergency vehicle, was bound to exercise "due regard for the safety of all persons," 18 D.C.M.R. § 2002.4 (1981) (previously found at 17 D.C.R.R. § 6), and was not protected from the consequences of his reckless disregard for the safety of others. *Id.* The municipal regulations define an authorized emergency vehicle as the vehicle of *any* police department, 18 D.C.M.R. § 9901, presumably including that of Arlington County; under District law the regulation therefore applies to Kyle and imposes on him a duty to act with due care for the safety of others while driving an emergency vehicle in the District. *See also Tetro v. Town of Stratford*, 189 Conn. 601, 458 A.2d 5 (1983) (liability permissible on a finding of negligence, based

on language similar to that in the District regulation); *Mason v. Bitton*, 85 Wash.2d 321, 534 P.2d 1360 (1975) (en banc) (statute with language like that in the District regulation imposes actionable duty to exercise due care during felony pursuit); *Myers v. Town of Harrison*, 438 F.2d 293 (2d Cir. 1971) (same). *See generally* Annot., 4 A.L.R. 4th 865 (1981) (citing numerous cases on state, county and municipal liability for injury to innocent persons as a result of police chases).

Apart from our finding that the proper standard is that of due care, we also find that defendants have waived whatever challenge they might have had to the instruction on standard of care. They did not offer an instruction below that was refused, did not state grounds for any objection they might have had to the instruction given, and did not clearly object. *See* FED. R. CIV. P. 51. In his memorandum and order denying defendants' motion for judgment notwithstanding the verdict, Judge Greene wrote,

> It may be noted, too, that defendants submitted only the sketchiest of instructions on this as on other issues (Tr. 1775); they did not renew their request on this issue after the Court apprised the parties on how it would instruct (Tr. 1789-1800); nor did they renew the objection after the Court completed its charge (Tr. 1885-86).

Biscoe v. Arlington County, No. 80-0766, Mem. Op. at 3 n.2 (D.D.C. Aug. 5, 1983, *reprinted in* Joint Appendix ("J.A.") 87, 89.

In its Reply Brief, Arlington County nonetheless asserts that it did challenge the instruction. The trial record and transcript suggest otherwise. First, the County neither produces nor points to any proferred instruction containing the gross negligence standard. Second, in the *one instance* when the County's attorney suggested that the proper standard might be gross negligence, the court responded,

> I must say in all candor nobody really submitted any instructions about this case, so we have worked up some instructions which are being typed now and which I have to look over some more and will take a while to get them in final form and I will distribute them to the parties and I think some of the questions we are talking about now are simply in the abstract and you can talk more appropriately in the concrete when my proposed instructions are completely finalized. That will take about 45 minutes to an hour, so we will at least have some instructions we can talk about rather than just saying well, this is appropriate and that is not, and so forth, so that is what I propose to do.

Tr. at 1775-76. Thereafter, counsel for the defendants raised numerous issues, but did not challenge the instructions setting forth a negligence standard. Rule 51 states with unmistakable clarity that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." The County has not demonstrated that it objected at any stage to the instruction offered by Judge Greene, and surely never did so with *any* explanation. We therefore decline to consider the argument on appeal, particularly in the absence of plain error. *See Hobson v. Wilson*, No. 82-2159, slip op. at 55-56 (D.C. Cir. June 8, 1984) (declining to address challenge to jury instruction when objection was not properly preserved at trial).

C. *Existence of a Cause of Action*

Defendants contend that District of Columbia courts do not recognize the causes of action on which the Biscoes based their action. However, the cases on which defendants rely for this argument are plainly inapplicable; accordingly, we reject their contention as being wholly without merit.

Initially, there is no question that the District recognizes a cause of action for negligent training and supervision of police officers. This court has expressly so held. *Marusa v. District of Columbia*, 484 F.2d 828, 830-31 (D.C. Cir. 1973); *Carter v. Carlson*, 447 F.2d at 368.

Nor should there be any question that a police officer's improper conduct of a felony stop and pursuit may give rise to a suit in damages.[9] Defendants nevertheless rely on cases establishing the general proposition that no cause of action exists against police officers who fail to prevent crime, *see, e.g., Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983) (en banc), to argue that no cause of action exists here. However, *Morgan* expressly distinguished cases of the kind we confront, in which a police officer, having exercised discretion and chosen to act fails to act reasonably, *see id.* at 1313, thereby proximately causing injury to another. Cases such as *Morgan* involve a failure to assist when assistance might prevent or cut short ongoing criminal activity; they do not involve a situation like the one here, in which police activity, affirmatively undertaken and negligently handled, directly contributes to creation of a dangerous situation.[10] In the former instance, courts have found that police officers have no individualized duty to prevent crime, and that failure to do so is not actionable. The

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[9] Indeed, to uphold the judgment here we need only determine that defendants are jointly and severally liable for either of these acts. We focus on the felony pursuit in the belief that it provides the starkest contrast to the line of cases on which the defendants' rely and readily exposes the flaw in defendants' reliance on those cases.

[10] The court in *Morgan* focused on the problems inherent in permitting a jury to second-guess a decision on allocation of police resources. Particularly when, as in the instant case, the police officer acts in violation of specific regulations and standards established to prevent precisely the consequence that has occurred, and when testimony establishes a proper course of action against which to measure a defendant's conduct, we find *Morgan* wholly inapplicable.

situation we confront is of a different kind altogether, involving officers with a duty to exercise due care for the safety of innocent persons, and is not controlled by *Morgan*.[11] This point is amply highlighted by the fact that numerous jurisdictions have recognized a cause of action for negligent conduct of a high-speed chase, where the pursued vehicle strikes and injures an innocent third party. *See, e.g., Fiser v. City of Ann Arbor*, 417 Mich. 461, 339 N.W.2d 413 (1983); *Tetro v. Town of Stratford*, 189 Conn. 601, 458 A.2d 5 (1983); *City of Sacramento v. Superior Court*, 131 Cal. App. 3d 395, 182 Cal. Rptr. 443 (Ct. App. 1982); *Selkowitz v. County of Nassau*, 45 N.Y.2d 97, 408 N.Y.S.2d 10, 379 N.E.2d 1140 (1978); *Reed v. Winter Park*, 253 So.2d 475 (Fla. App. 1971); *Myers v. Town of Harrison*, 438 F.2d 293 (2d Cir.), *cert. denied*, 404 U.S. 828 (1971); *Mason v. Bitton*, 85 Wash.2d 321, 534 P.2d 1360 (1975) (en banc); *Schatz v. Cutler*, 395 F. Supp. 271 (D. Vt. 1975). *See generally* Annot., 4 A.L.R. 4th 865 (1981) (citing numerous cases on government liability for injury to innocent persons as a result of a police chase).

D. *Remaining Issues*

Defendants raise several other issues, which were not pressed at oral argument, and we find no merit to them.[12]

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[11] *See Joyner v. District of Columbia*, 109 Daily Wash. L. Rptr. 369 (Mar. 2, 1981) (recognizing a cause of action of the kind filed by the Biscoes).

[12] Briefly, as to defendants' claims regarding personal jurisdiction, we affirm on the basis of Judge Greene's memoranda denying defendants' motion for summary judgment and their motion for judgment notwithstanding the verdict. *See* J.A. 66-69, 87-88. As to Officer Kyle's efforts to relitigate the jury's conclusions on proximate cause, we believe the evidence adduced at trial was more than sufficient to send the issue to the jury, and we surely have no basis on which to conclude that the jury's conclusions were so wholly unreasonable as to require reversal. *See Calloway v. Central Charge Service*, 440 F.2d 287, 289 & n.2 (D.C. Cir. 1971). Finally, as to the

In short, having reviewed the entire record in this case with great care, we find that the jury's verdict was fully justified by the evidence. Furthermore, we can find no basis to overturn any of the challenged evidentiary or legal rulings of Judge Greene.

CONCLUSION

For the foregoing reasons, we affirm the court's judgment.

So ordered.

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expert economic testimony of which defendants complain, we believe an evidentiary predicate existed for admission of the testimony *as solicited by Judge Greene*, and, having read the colloquy among counsel in the trial transcript, we conclude that Judge Greene's reformulation of the proffered testimony adequately addressed defendants' concerns. *See* Tr. at 742-61.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0766

ALVIN B. BISCOE, *et al.*,
Plaintiffs,

v.

ARLINGTON COUNTY, *et al.*,
Defendants.

[Filed Aug. 5, 1983]

MEMORANDUM

Defendants make a number of arguments in support of their motions for judgment notwithstanding the verdict and for a new trial but, except for the request for a remittitur with respect to Mrs. Biscoe, none has merit.

I

1. It is claimed that the Court lacked jurisdiction over Arlington County under the longarm statute. D.C. Code § 13-423. Jurisdiction is present on several bases.

First, section 423(a)(3) of title 13 vests jurisdiction in the courts in the District of Columbia for tortious injury in the District caused by the defendant either directly or through an agent. Officer Kyle's activities, which were alleged and proved to have caused injury to the plaintiffs did, of course, occur in this District. Second, there is jurisdiction because Arlington County has engaged in a persistent course of conduct in the District. Section 423(a)(4)). This is evidenced, at a minimum,

by County regulations establishing the procedures to be followed when suspects are pursued into the District as well as by proof that County officers regularly confer by telephone with the Metropolitan Police Department.[1] Third, once where, as here, a claim involves acts occurring in the District of Columbia, there is jurisdiction even if some portion of the transaction (*i.e.*, negligent training and supervision) occurred elsewhere. See *Cohane* v. *Arpeja-California, Inc.*, 385 A.2d 153, 158-59 (D.C. App. 1977). Finally, the negligent training and supervision claim against the County is properly before the Court under the doctrine of pendent jurisdiction. See Wright & Miller, *Federal Practice and Procedure:* Civil § 3567, at 445.

2. Defendants contend that under D.C. Code § 1-121 the standard of care by which they should have been judged was that of "gross negligence." However, the cited provision applies only to claims against "an employee of the District," and even then only with regard to matters occurring as a result of his operation of a "vehicle owned or controlled by the District." Neither factual predicate is present here.[2]

3. Arlington County claims that there was a failure of proof with regard to proximate cause—an argument that appears to be based principally upon the theory that the actions of the defendant Britton may have been a proximate and superseding cause. The basic problem

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[1] These conversations apparently refer to visits by County police officers to exchange prisoners and the like.

[2] It may be noted, too, that defendants submitted only the sketchiest of instructions on this as on other issues (Tr. 1775); they did not renew their request on this issue after the Court apprised the parties on how it would instruct (Tr. 1789-1800); nor did they renew the objection after the Court completed its charge (Tr. 1885-86). As to the proper standard of care with respect to the officers' conduct, see *Morgan* v. *District of Columbia*, 449 A.2d 1102 (D.C. App. 1982).

with that contention is that Arlington County abandoned any reliance on the possible negligence of Britton as early as August 1982. See Tr. 1058-61; see also the Magistrate's pretrial order of November 19, 1982; and the County's Response to the Court's Trial Order.

In this connection, defendants also claim that the Court erred when it permitted one of plaintiffs' experts to give his conclusion regarding the proximate cause of the accident "thus invading the province of the jury." Memorandum of Points and Authorities, p. 9. There is no merit whatever to this contention. See Rule 704, Federal Rules of Evidence.

4. Defendants argue that under *Warren* v. *District of Columbia*, 444 A.2d 1 (D.C. App. 1981) and similar decisions[3] Officer Kyle did not owe a duty to plaintiffs such that a breach would result in liability. In *Warren*, two women had telephoned the police to report the presence of an intruder in their rooming house. The police arrived but departed shortly thereafter without conducting any significant investigation. Eventually, the women were abducted, raped, and robbed. The District of Columbia Court of Appeals upheld a trial court dismissal of their action against the District, holding that "government and its agents are under no general duty to provide public services such as police protection to any individual citizen." 444 A.2d at 3. The instant case, however, involves more than a mere generalized failure to provide police protection; rather, it presents a situation where an officer failed to comply with regulations—such as that governing speedy pursuits into the District—promulgated to avoid the very type of accident that here occurred and to protect individuals situated as are these plaintiffs.[4]

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[3] See *Westminster Investing Corp.* v. *G. C. Murphy Co.*, 434 F.2d 521 (D.C. Cir. 1970).

[4] The court in *Warren* recognized that any additional element to the general duty to provide police protection may give rise to liability. 444 A.2d at 3 n.2.

In *Morgan* v. *District of Columbia*, 449 A.2d 1102 (D.C. App. 1982), decided subsequent to *Warren*, the Court of Appeals made clear the distinction between an amorphous, general duty and the kind of duty the breach of which may give rise to a cause of action. In that case, a police officer first threatened and then shot his wife and several others. The District of Columbia was sued on the theory that it was negligent by failing to act, through its agents, after receiving a report of an officer's gun threat. In response to the argument, similar to that made in this case, that the Police Department owed the plaintiffs no duty the breach of which could be regarded as negligence, the Court of Appeals stated in language directly relevant here that the Department did owe a duty to the public to use reasonable care in supervising and controlling the officers in its employ. 449 A.2d at 1108. Significantly, the court relied heavily on the duty of the Department to abide by its own regulations (449 A.2d at 1109 n.9), and it noted and distinguished *Warren, supra.*[5]

5. Defendants claim that the Court should have admitted the testimony of two of their witnesses notwithstanding that the information required by Rule 26(b)(4), Fed. R. Civ. P., concerning these persons had not been furnished. The proffer made with respect to these witnesses was that they would testify regarding plaintiffs' experts. Since the requisite Rule 26(b)(4) material was not provided at any time, the Court refused to allow the witnesses to proceed. Defendants' subsequent claim that the testimony would be more factual than expert in nature is not compelling.[6]

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[5] 449 A.2d at 1108. Defendants also contend that the proof was insufficient to support a jury finding of County negligence in training and supervising Officer Kyle, but there was ample evidence on this issue. See, *Carter* v. *Carlson*, 447 F.2d 358, 368 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1973).

[6] In any event, this testimony was marginal and cumulative. See also, Tr. 1763-64.

6. Defendants have brought to the Court's attention a document entitled "Metropolitan Washington Council of Governments Police Mutual Aid Agreement" in support of their argument that Arlington County is possessed of sovereign immunity. The Compact does not apply to the situation here involved, for it deals only with "imminence of fire, flood, epidemic, war, internal disorder, or other public disaster." Indeed, subsequent to its adoption, the Compact may have been amended[7] to include the exchange of narcotics investigators across jurisdictional lines, suggesting under the doctrine of *expressio unius est exclusio alterius* that a high-speed chase in the context of a robbery is not included under the Compact. In any event, none of these matters was or could have been explored at the trial because the Compact was not produced at any time prior to the filing of the current motions. The Compact, an official document, obviously was always available to defendants, and they may not proffer it now for the first time in support of a request for a new trial.

7. The Court has examined defendants' other claims,[8] including those regarding the sufficiency of evidence to support the jury's verdict,[9] and it finds them all to lack merit.

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[7] The copy submitted to the Court contains neither signatures nor a date.

[8] *E.g.*, the claims regarding future lost wages; the mistrial motions; the claim regarding the sufficiency of the evidence to support negligence and proximate cause with regard to negligent supervision and training; the admissibility of expert testimony on the issue of negligent supervision and training; and the various additional grounds listed in Officer Kyle's motion.

[9] See *Vander Zee* v. *Karabatsos*, 589 F.2d 723, 728 (D.C. Cir. 1978); *Webster* v. *M. Loeb Corp.*, 400 A.2d 319, 320 (D.C. App. 1979).

II

The defendants request a new trial, or in the alternative a remittitur, on the ground that the jury verdict with respect to Mr. Biscoe and Mrs. Biscoe is so excessive as to indicate a jury motivated by passion and prejudice.

The D.C. Court of Appeals has recently reiterated the standards which must be applied in evaluating a verdict against this kind of attack. *Phillips* v. *District of Columbia*, 458 A.2d 722 (D.C. App. 1983). Briefly summarized, these standards are as follows. When a jury verdict is excessive, the court may grant a remittitur. A verdict is deemed to be excessive if it is so large as to be beyond all reason, so great as to shock the conscience of the court, or so large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate. See also Wright & Miller, *Federal Practice and Procedure*, Civil, §§ 2807, 2815; *Williams* v. *Stewart Motor Co.*, 494 F.2d 1074 (D.C. Cir. 1974).

1. The damages awarded by the jury to Mr. Biscoe are clearly not excessive under these standards. This plaintiff is a fifty-year old man with a further life expectancy of 25 years. A Ph.D. in economics, he has had a substantial earnings history in various professional jobs. As a consequence of the accident, he lost both legs (one at the scene itself, the other by amputation), and because of the nature of the injuries and the amputations, he is unable to walk, even with crutches, but must use a wheelchair. Plaintiff has had and is in further need of substantial psychiatric care and assistance. There was evidence from which the jury could reasonably have found that his medical and hospital expenses, medical equipment needs, repair of a home to accommodate his present condition, past lost earnings, and other special damages amount to close to $700,000. There was also evidence from which the jury could have concluded that Mr. Biscoe's state of health is so fragile that it is likely that

he will lose substantial amounts in future earnings over his remaining lifetime. On the basis of these special damages, it was not unreasonable for the jury to return a verdict of $4 million, including damages for pain and suffering as to which there was substantial evidence.[10]

2. The situation is different with regard to Mrs. Biscoe. That plaintiff testified to the difficulties she is experiencing due to her husband's condition, including her need to care for him, the adjustments she has had to make and will continue to have to make, and the psychotherapy treatments she has received. Counsel's closing arguments aptly summarized the damages testimony on her behalf by asking the jury to "consider what she has gone through"; that her husband could not now help her around the house; and that the couple will be unable to go out together the way other persons do. Tr. 1833-34. There is no question that the evidence sustains these statements, and that these factors impose a substantial burden and a significant hardship on Mrs. Biscoe. Indeed, it would not be difficult to speculate that no amount of money could, for Mrs. Biscoe, replace her husband's health. But that, of course, is not the test under the law.

Loss of consortium consists, broadly speaking, of loss of services, loss of companionship, and interference with sex relationships. See generally, Stein, *Damages and Recovery in Personal Injury and Death Actions*, pp. 417-27. None of these—except in some instances loss of services—is susceptible of precise quantification in monetary terms. It does not follow, however, that awards of damages under these rubrics may not be found to be unreasonable. Indeed, grants of a new trial and remittiturs occur typically where special damages are fully ascertained while damages for pain and suffering—in a sense

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[10] Defendants made no effort, either by way of evidence, or in closing argument, to refute the damages evidence adduced on behalf of Mr. Biscoe.

as intangible as loss of consortium—are found to be unreasonably high.

One way to establish reasonableness in this necessarily amorphous area is to consider what kind of damage verdicts have been returned in other, somewhat comparable situations. According to 2 *Personal Injury Valuation Handbook* 1206-1216 (1976), the average award for loss of services during the 1969-76 time period in the United States [11] was $9,270.[12] The largest loss of consortium verdict noted was $195,000 which was awarded to a woman whose husband suffered permanent brain damage in a car-train collision, and whose daughter was killed in the same accident. *Martin, et al.* v. *Ann Arbor Railroad Co., et al.*, No. 6785 (Mich. March 1974). See also, *Hall* v. *General Motors Corporation*, 647 F.2d 175 (D.C. Cir. 1980) (loss of consortium award to husband whose wife had been rendered a quadriplegic reduced from $1.5 million to $500,000); *Manning* v. *Mobile Aerial Towers, Inc.*, 488 F.2d 127 (6th Cir. 1973) (loss of consortium award to wife where husband lost both hands and a portion of both arms, reduced from $75,000 to $30,000).

It is also of significance that there was substantial evidence at the trial concerning the care Mrs. Biscoe is now obligated to render to her husband. See, *e.g.*, Tr.

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[11] According to the *Handbook*,

> [T]he injury and expectancy and liability probability tables are based upon over 75,000 personal injury verdicts collected from all areas of the United States . . . . The accuracy of the tables has been scientifically validated.

Volumes 1 at ii-iii.

[12] This includes loss of services sustained by wives, by husbands, and by parents for the loss of their children's services. The average award for the loss of services sustained by wives as a consequence of physical injury to their husbands was $10,751, and that awarded to husbands was $12,659.

1255, 1258-59.[13] On the other hand, the testimony regarding injury to Mrs. Biscoe as a result of loss of services from Mr. Biscoe is, relatively speaking, scant. Evidence of services Mrs. Biscoe must render to her husband of course supports in part the $4 million verdict for Mr. Biscoe; it does not also support the verdict in favor of Mrs. Biscoe for loss of consortium.

For the reasons stated, the Court is of the opinion that the $1 million awarded to Mrs. Biscoe exceeds the range of the reasonable. Upon consideration of all the circumstances, as revealed by the testimony of the witnesses and the other evidence, the Court concludes that any amount larger than $350,000 to Mrs. Biscoe would be excessive. The Court will therefore grant defendants' motion for a new trial with respect to Mrs. Biscoe unless she agrees to a reduction of the jury award to $350,000.[14]

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

Dated: August 5, 1983

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[13] While that testimony was admitted to support Mr. Biscoe's claim, it must have influenced the jury in regard to the award to Mrs. Biscoe.

[14] See *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53 (1966); *Hulett* v. *Brinson*, 229 F.2d 22 (D.C. Cir. 1955).

U.S. Const. art. IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. (1) The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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No. 84-777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARLINGTON COUNTY and MICHAEL KYLE,
Petitioners,

v.

ALVIN B. BISCOE, JR., and ELEANOR L. BISCOE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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December 1984

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QUESTIONS PRESENTED

A pedestrian lost both legs as a result of an automobile accident in the District of Columbia that occurred in the course of the pursuit of a robbery suspect by an Arlington County, Virginia, police officer. In an action for damages against Arlington County and the officer, federal courts in the District of Columbia applied the District's own tort liability rules and held Arlington County liable even though the county would have been immune if Virginia law had been applied, and held the officer liable for a want of due care. The questions presented are:

1. Whether the full faith and credit clause or some other constitutional principle required the courts to bar recovery from Arlington County on the ground of the immunity from liability conferred on a Virginia county by Virginia law.

2. Whether the privileges and immunities clause of Art. IV, § 2 or equal protection principles were violated by the standard applied in determining whether the conduct of the Arlington County officer was negligent and whether that question was raised below and preserved for review by this Court.

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STATEMENT

On September 29, 1979, a savings and loan in Arlington County, Virginia, was robbed. Michael Kyle, an Arlington County police officer, responded to a broadcast alarm by following a car driven by a suspect in the robbery across the Theodore Roosevelt Bridge into the District of Columbia. Officer Kyle, alone in his police car, turned on his emergency lights and siren and caused the suspect car to stop on the E Street ramp off the Roosevelt Bridge. Officer Kyle parked his car behind. The suspect driver, Lyntellus Brooks, got out of his car with his hands in the air. Kyle directed him to stand with his hands on

the trunk of his car, but the officer took no other precautions as he then went to the passenger side of the car to investigate the other occupants, a man and two women. Brooks, who had left the driver's door ajar and the car engine running, jumped back into the car and drove off down the E Street Expressway. (Pet. App. 2a-4a.)

Officer Kyle returned to his car and, with lights flashing and siren sounding, chased Brooks along the expressway and through the E Street tunnel at high speed. Shots were fired at the officer. In the intersection of E and 19th Streets Brooks hit another car, and his car careened off into the southeast corner of the intersection. There it pinned a pedestrian, the respondent Dr. Alvin Biscoe, against a light pole, severing one of his legs above the knee and so mangling the other that it later had to be amputated, also above the knee. Brooks fled on foot, was restrained by pedestrians and was ultimately taken into custody, after the frustrated Officer Kyle hit him on the side of the head with the butt of the officer's shotgun. (Pet. App. 4a-5a.)

Dr. Biscoe and his wife, the respondent Eleanor Biscoe, sued in the District Court for the District of Columbia, founding jurisdiction on diversity of citizenship, 28 U.S.C. § 1332(a). Officer Kyle, Arlington County, and Brooks were among the defendants. The jury returned a verdict finding that Officer Kyle was negligent in the way he handled the stop of Brooks and his car on the bridge ramp and in his high-speed chase of Brooks's car along E Street, and that Arlington County was responsible for his negligence on conventional respondeat superior grounds. The jury found Arlington County itself negligent, without regard to respondeat superior, in its training and supervision of Officer Kyle. Brooks was also found negligent. The jury found the necessary causal relationship between the defendants' negligence and the plaintiffs' injury. On this basis, the jury awarded $4

million to Dr. Biscoe for the loss of his two legs and $1 million to his wife. The latter award was reduced on remittitur to $350,000. (Pet. App. 5a-7a.)

Officer Kyle and Arlington County appealed. The court of appeals affirmed the judgment entered on the jury's verdict (subject to the remittitur). (Pet. App. 29a.) It held that this Court's decision in *Nevada* v. *Hall,* 440 U.S. 410 (1979), foreclosed Arlington County's claim that it was entitled, in litigation in a District of Columbia court over an automobile accident that occurred in the District of Columbia, to the immunity from liability conferred on it by Virginia law. (Pet. App. 8a-12a.) The court also held that the standard to be applied in determining liability was "due care" and that in any event the defendants, by not objecting to the trial court's standard-of-care instruction (*see* Pet. App. 31a n.2), waived any claim that the proper standard was gross negligence. (Pet. App. 23a-26a.)

ARGUMENT

The decision below presents no issue worthy of review by this Court. Only one question presented here is actually presented on the record and was both raised and preserved below. That is the question whether the full faith and credit clause of Article IV, Section 1 (or some other unspecified doctrine explicit or implicit in the Constitution), requires a court in the District of Columbia to allow Arlington County to avoid liability for its negligent part in causing a traffic accident within the borders of the District because Virginia counties are immune from tort liability in Virginia courts. That question, which for reasons of advocacy petitioners state two different ways as their questions 1 and 2, is squarely answered against them by this Court's decision in *Nevada* v. *Hall,* 440 U.S. 410 (1979). Judge Edwards's careful opinion for the court of

appeals below refutes petitioners' attempted distinctions of that decision.[1]

The other question that petitioners purport to present is whether it violates the privileges and immunities clause of Article IV, Section 2, or is a denial of equal protection to assess Officer Kyle's liability according to a standard different from that which would have been employed in assessing the liability of a District of Columbia police officer. Petitioners, who made no such argument below, do not specify the nature or source of the different standards. They did argue in the court of appeals that, because the District is liable only for the gross negligence of one of its policemen driving a District police car on an emergency run, the jury should have been instructed that *Arlington County* was liable only for gross negligence. The court below held correctly that petitioners had waived even that contention by not objecting to the trial court's standard-of-care instruction. Petitioners certainly have never raised any constitutional question pertaining to the standard of care as it relates to Officer Kyle. In any event, there is no substantial constitutional question.

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[1] The full faith and credit clause question seems not to affect Officer Kyle's liability. Virginia counties, not Virginia county employees, enjoy full sovereign immunity in Virginia courts. County employees have a measure of immunity but apparently are liable for their non-discretionary torts in Virginia as District employees are in the District of Columbia. *See* Messina v. Burden, No. 81-1485, slip op. at 13 (Va. Oct. 12, 1984) (quoted at Pet. 4 n.1). Officer Kyle's argument below was that his acts were discretionary so that he was not liable under *District* law. (Pet. App. 19a-22a.) The petition includes a querulous footnote (Pet. 6 n.2), but it presents no question concerning the court of appeals' ruling that, under District of Columbia law, Officer Kyle's acts were ministerial and operational and not discretionary (Pet. App. 19a-22a). This Court's answer to any such question would be, if anything, less authoritative than that of the court below. If the court below wrongly discerned the line that the District of Columbia Court of Appeals has drawn to separate the discretionary from the non-discretionary, only that court can say so with authority.

1. In *Nevada* v. *Hall,* 440 U.S. 410 (1979), an employee of the University of Nevada driving a university automobile on official business was involved in a collision in California; he was killed and two California residents, occupants of the other car, were injured. They sued in a California state court, naming the State of Nevada as a defendant. Nevada claimed immunity from suit in California courts. Nevada argued further that the full faith and credit clause required California to give effect to the Nevada law that limited the State's waiver of immunity to suits in Nevada courts and in any event limited its liability for torts of its employees to $25,000. The California courts rejected these claims and, after judgment was given for the plaintiffs against Nevada and affirmed, this Court also rejected them. The Court could not find in Article III or the Eleventh Amendment any implication that one state's courts must respect the sovereign immunity of another state. 440 U.S. at 414-21. So far as the full faith and credit clause is concerned, the Court said, as quoted by petitioners, that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." 440 U.S. at 422 (Pet. 7).

The court below, in considering petitioners' arguments that this case—so similar in so many ways on the face of things—is different from *Nevada* v. *Hall,* properly focused on what this Court had to say about the full faith and credit clause. Whatever the implications of Article III and the Eleventh Amendment for the sovereign immunity of the states, they do not reach a mere county. On the same day that *Nevada* v. *Hall* was decided, the Court in another case spoke matter-of-factly, in a subordinate clause, of "a county or municipality, which has no Eleventh Amendment immunity . . . ." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 401 (1979). See also *Monnell* v. *New York State Dep't of*

Social Services, 436 U.S. 658, 690 n.54 (1978); *Lincoln County* v. *Luning,* 133 U.S. 529, 530 (1890).

The court of appeals found that the "legitimate public policy" of the District of Columbia was to recognize the liability of the District for non-discretionary tortious conduct of its employees. That policy of compensating victims of non-discretionary official torts from public funds was confirmed by the District of Columbia Court of Appeals in *Wade* v. *District of Columbia,* 310 A.2d 857 (D.C. 1973) (en banc). The court there held that assault and battery and false arrest were not discretionary torts and the District of Columbia was liable for such acts on the part of one of its police officers if the plaintiffs in that case could prove them.

The court below ruled, consonantly with *Wade,* that both Arlington County's own negligence in training and supervising Officer Kyle and Officer Kyle's negligence imputed to it were non-discretionary (note 1, *supra*). (Pet. App. 10a, 19a-22a.) It followed that "[f]orced application of Virginia's law would . . . frustrate the policies that underlie the District's immunity rules; under *Nevada* v. *Hall,* the District is not required to honor Virginia's claim of sovereign immunity under such circumstances." (Pet. App. 10a.)

2. That is probably all that need be said on petitioners' questions 1 and 2. The decision below is an unremarkable, unexceptionable application of *Nevada* v. *Hall.* But petitioners stake their all on a footnote to the opinion in *Nevada* v. *Hall,* in which the Court said that California's exercise of jurisdiction "poses no substantial threat to our constitutional system of cooperative federalism," that "[s]uits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," and that the Court had no occasion to consider

"whether different state policies, either of California or of Nevada, might require a different analysis or a different result." 440 U.S. at 424 n.24.

What we have here seems to be the comparable case of a "traffic accident[ ] occurring outside of" Arlington County—one of the very "traffic-accident torts" to which the dissenting Justices thought the holding of *Nevada* v. *Hall* was confined by footnote 24. 440 U.S. at 429. Petitioners nevertheless urge that this is a case reserved by footnote 24 that requires a different analysis and a different result. They say that imposing liability on Arlington County does pose a "substantial threat to our constitutional system of cooperative federalism" and threatens to interfere with Arlington County's "capacity to fulfill its own sovereign responsibilities." This is so, petitioners assert, because (1) the missions of county police forces in neighboring jurisdictions are different from, and more important than, the missions of state universities in neighboring states; (2) Officer Kyle was trained in Arlington and supervised from there so that not all the relevant events occurred in the District; (3) Arlington County was subject to liability for ordinary negligence whereas the District of Columbia would have been liable, in the same circumstances, only for gross negligence; and (4) there is an interest in fresh pursuit of suspects across jurisdictional lines, recognized by a statute enacted for the District by Congress, and a broader federal interest in cooperative law enforcement. (Pet. 10-14.)

There is nothing to any of these asserted reasons for distinguishing *Nevada* v. *Hall*. Petitioners lay their greatest stress on the first. Their rhetoric about how the decision below may affect police conduct (Pet. 4-7) is overblown. The court below showed that in the circumstances of the case any concern that its decision would "deter police officers from proper performance of their duties" was "weak, if existent." (Pet. App. 16a-17a.)

In any event, Arlington County, or Virginia on its behalf, can claim no special strength for a policy of protecting the county against liability for the line-of-duty negligence of its police officers. Virginia's policy of immunity of its counties from liability is uniform for all county activities. It is not limited to police chases, and the torts of policemen enjoy no special status under the Virginia law of county immunity. The policy of immunity extends also, and with the same force, to the county truck driver who negligently collides with another vehicle while carrying seedlings to plant in a county park or to the county official who hits a pedestrian while driving a county car to a Rotary Club luncheon to explain county policy. So broad a policy must logically rest in large part, at least, on Virginia's "concern for the financial integrity of its counties," which, as the court below pointed out, could be satisfied through the purchase of liability insurance to cover the unusual case of extra-state torts for which Arlington County would not be immune. (Pet. App. 16a.)

Furthermore, the relative weight of Virginia and District of Columbia policies or interests is of no moment in determining whether the full faith and credit clause requires the application of Virginia law by a District of Columbia court. Seven of the eight Justices who participated in *Allstate Ins. Co.* v. *Hague,* 449 U.S. 302 (1981), agreed that "the Court has . . . abandoned the weighing-of-interests requirement" under the full faith and credit clause, *id.* at 308 n.10 (plurality opinion), so that "[t]he Court should invalidate a forum State's decision to apply its own law only when there are no significant contacts between the State and the litigation," *id.* at 332 (dissenting opinion).

Surely no one would doubt that the District of Columbia has contacts that are at least significant with a traffic accident that takes place in the District and causes

serious injury to one sojourning in the District, as Dr. Biscoe was. After *Allstate* if not before, it is immaterial to full faith and credit analysis how extensive are Virginia's rival contacts with the transaction, making irrelevant not only the strength of Virginia's interest in county immunity for policemen's torts but also the locale of the training and supervision of Officer Kyle. When all that matters is that the District's contacts are "significant," it is immaterial what standard the District of Columbia applies to the transaction, due care or gross negligence, or that the standard may differ from that applied in other cases. And it is immaterial by what authority or in furtherance of what interest Officer Kyle was pursuing Brooks in the District; nothing in the Fresh Pursuit Act (Pet. 2) suggests that the District cannot impose liability on a jurisdiction that sends into the District in fresh pursuit a policeman who behaves as carelessly as Officer Kyle did in attempting to detain Brooks and his passengers and then renewing the pursuit of them along crowded city streets.

Finally, it is true that three Justices dissented in *Nevada* v. *Hall,* 410 U.S. at 427, 432, and the footnote of which petitioners make so much may have been the response to their concern over the breadth of the opinion. (Pet. App. 10a-11a.) But those three Justices, who were later to join either the plurality opinion or the dissenting opinion in *Allstate,* did not try to satisfy their concern for what they regarded as an intrusion into Nevada's sovereignty from the full faith and credit clause. They thought that Nevada's sovereign immunity had its roots elsewhere in the Constitution—the Eleventh Amendment and Article III—and must be recognized by California because of demands implicit in those provisions, not because of the demand of full faith and credit. It bears repeating that Arlington County does not share in whatever immunity Virginia might derive from those other constitutional sources. If Arlington County is not aided by full faith and

credit—as it is not—it has no other conceivable constitutional claim to recognition of its immunity.

3. Provisions of the District of Columbia Code codify and define a specific branch of the District's liability for the torts of its employees, automobile accident torts. In most cases the District is liable for harm caused by negligent operation of a vehicle. For claims "arising out of the operation of an emergency vehicle on an emergency run," the District is liable only for gross negligence. D.C. Code Ann. § 1-1212. An "emergency run" is defined to refer to the movement of a District-owned vehicle, and only employees of the District are encompassed by the statute. *Id.* § 1-1211(4), (6). The court below ruled that, as is obvious on the face of the statute, it does not establish the standard for determining Arlington County's liability for the conduct of its officer in pursuing bank robbers in an Arlington County vehicle. (Pet. App. 24a.) The court ruled that the standard applicable to that conduct was "due care, as limited by the guidelines applicable to Officer Kyle's conduct." (Pet. App. 23a.) Those guidelines include a policy of not engaging in high speed chases—chases at more than 20 miles an hour above the speed limit—in the District of Columbia. (Pet. App. 5a & n.1.) There was evidence from which the jury could have found that Officer Kyle averaged over 55 miles an hour and drove as fast as 80 miles an hour in his second chase of Brooks eastward along E Street, where the speed limit is 30 miles an hour through the tunnel and then 25. (Pet. App. 4a.)

Petitioners argued in the court of appeals that *Arlington County's* liability should have been measured according to the gross negligence standard that petitioners said would have been applicable to the District of Columbia in comparable circumstances. The court rejected that argument on the merits, as indicated above, because the statute is limited to the case of District employees driving District

cars. (Pet. App. 23a-25a.) The court also stated that the statutory gross negligence standard "does not protect employees, as opposed to the municipality, and surely does not cover Officer Kyle" (Pet. App. 24a), and ruled that petitioners failed to challenge the district court's instructions to the jury on standard of care and had thereby waived the claim that the gross negligence standard should have applied even to Arlington County (Pet. App. 25a-26a).

It is not clear whether, in urging that the privileges and immunities clause and equal protection prevent the application to Officer Kyle of a standard of care different from that applicable to a District of Columbia officer, petitioners mean to invoke the inapposite gross negligence statute. They do not specify how or for what reason Officer Kyle was treated differently from the putative District officer. (Pet. 17-18.) The statute limiting the District's own liability to cases of gross negligence is the nearest thing we have found. But that statute clearly has nothing to do with the standard governing the liability of individual employees; any claim based on it even as to Arlington County was waived by failure to preserve it in the district court; no constitutional claim relating to it or any other standard-of-care issue was raised in either of the courts below; and, finally, there is no constitutional barrier to the District's limiting its own liability in a way that the liability of no other employer, resident or non-resident, is limited.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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HOP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-777

ARLINGTON COUNTY

and

MICHAEL KYLE,

Petitioners,

v.

ALVIN B. BISCOE, JR.

and

ELEANOR L. BISCOE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

Petitioners submit that respondents' arguments only serve to underline the importance of this Court granting a writ of certiorari in this case.

1. Whatever else may be said about this case, the acts of petitioner Arlington County and its employee, Officer Kyle, plainly involve the exercise of the sovereign power of the State of Virginia to enforce Virginia's criminal laws. Respondents' willingness to argue that the events herein represent solely a "traffic-accident tort" emphasize

the need for this Court to set out what Constitutional limits exist on the ability of a forum state to interfere with the exercise of such sovereign activities by a sister state.

2. Respondents also argue that the Constitutional issues presented by this case are somehow less important because the litigants assessed with a $4 million damage award were a county and its police officer discharging the State's sovereign duty to enforce the law. The Constitutional issue involves the obligation of the forum state to respect the sovereign immunity rules of the sister state affecting the exercise of its governmental powers—a Constitutional question not affected in the least by the litigant raising these issues.

3. Respondents somewhat surprisingly embrace in this Court an obviously unconstitutional position taken by the D.C. Circuit in its opinion below. Respondents acknowledge that the District of Columbia Code limits the District's liability for harm caused by an emergency vehicle to liability for acts of gross negligence. But respondents argue that this provision applies only to District vehicles and allows the District to hold out-of-state emergency vehicles to a stricter standard.

Respondents never bother to explain how this discrimination can be defended as Constitutional, particularly where the District of Columbia has invited the out-of-state police officer into the District to conduct fresh pursuit of a criminal. Rather, respondents only argue that petitioners waived their objection to the use of a stricter ordinary negligence standard in this case. There is no basis in the record for their position. This objection was specifically made to the District Court and was explicitly addressed by the District Court in its opinion denying petitioners' motion for judgment notwithstanding the verdict (Pet. 31a). The District Court did not find a waiver and indeed acknowledged that the peti-

tioners had submitted instructions on this issue (Pet. 31a n.2). But, much more important than any debate over a waiver, petitioners submit that the willingness of District of Columbia courts to impose a tougher standard on an out-of-state Arlington County police officer than would be applied to a District of Columbia police officer emphasizes the importance of the Constitutional issue that this Court reserved in *Nevada v. Hall.* Unless forum state courts respect the immunity laws of sister states when exercise of sovereign, governmental activities such as criminal law enforcement is at stake, serious clashes between the states will increasingly threaten the cooperative federalism embodied in the Constitution.

For the reasons set out in their Petition and in this Reply Brief, petitioners respectfully request this Court to issue a writ of certiorari in this case.

Respectfully submitted,

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